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Water Quality Program
MAY 23 2006

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May 19, 2006

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Phase 1 Municipal Stormwater NPDES Permit Comments

Ms. Ann Wessel
Washington Department of Ecology
Water Quality Program
P.O. Box 47696
Olympia, WA 98504-7696

Re: Permit Comments

Dear Ms. Wessel:

Our firm represents Puget Sound Energy. The following comments on the Phase I Municipal Stormwater General Permit are the additional comments referenced in the April 20, 2006 comment letter from Jacqueline Thiel Wetzsteon, Utilities Project Coordinator for PacifiCorp Environmental Remediation Company, which were submitted on behalf of PacifiCorp and Puget Sound Energy.

Should you have any questions about these comments, which are in addition to, and supplement the previously submitted comments, please direct them to Ms. Wetzsteon, or to the undersigned.

General Comments:

1. Permit Draft Significantly Improved. There are several strong features of the draft permit that make it a significant improvement over previous drafts. As a result, the new draft represents a major step forward. Ecology staff should be commended for making these improvements, which will, no doubt, be controversial in some circles.

In particular, this draft's focus on prohibiting discharges that would violate any water quality standard represents an important step forward for municipal stormwater permits. Past general permit drafts have lacked this requirement, relying instead on management plans that have had questionable success in

achieving needed cleanup of stormwater discharges. These plans have often failed to prevent water quality and sediment standard violations.

Many of the comments previously submitted on this permit have urged Ecology to move away from requiring discharges to meet specific standards. Ecology is likely to receive many objections to permit Condition S4, Compliance With Standards.

Ecology should not bend to those objections. A municipal stormwater permit that fails to mandate achievement of water quality standards is legally insufficient, and subject to challenge. Ecology has taken the right step by prohibiting discharges that violate standards.

2. Stormwater Management Program.

Under the proposed draft permit, an individual municipality's Stormwater Management Program ("SMP") provides the foundation for, and defines, the means by which each municipality will ensure that its stormwater discharges meet water quality standards. From the permit draft, however, it is not clear that the specific provisions of each municipality's SMP are incorporated as part of the permit, or that the provisions of the SMP are binding and legally enforceable under the permit. Similarly, the permit does not specify or provide for public review and comment on the SMP and its enforceable conditions.

These deficiencies should be rectified. As drafted, the permit moves most of the permit's operative conditions into the SMP. Failing to incorporate the provisions of the SMP into the permit as operative terms, failing to require Ecology review and approval of those conditions, and failing to provide an opportunity for the public to appeal the SMP, leaves the permit legally insufficient.

Further, by failing to incorporate explicitly the terms of the SMP into the permit, the permit limits the public's opportunity to consider and to assure itself that the permit will result in discharges that comply with water quality standards. And, it may impede the public's ability to exercise its rights under the Clean Water Act section 505(f)(6) to pursue citizen enforcement actions in the event that a municipality's program is insufficient, or is not being implemented in accordance with the SMP's requirements.

Specific Comments:

The following are comments addressing specific features of the draft permit,

including recommendations for improvement:

1. Condition S2. Authorized Discharges. The language of paragraph D. of this Condition is unclear, and, as currently drafted, may be subject to misinterpretation. As the operator of the permitted stormdrain system, the permittee is, and must be, responsible for ensuring that both inputs into the system and the discharge from the system are in compliance with the permit.

Other entities may also be legally responsible for the inputs into the system, or for the consequences of the system's discharge. But, the current language does not make this mutual responsibility clear.

We recommend that the language in paragraph D. be modified to read as follows (new language underlined):

D. This permit does not authorize any other illicit or other non-stormwater discharges except as provided in Special Condition S5.C.8 or S6., nor does it relieve the permittee or the entities responsible for illicit discharges, including spills of oil or hazardous substances, from responsibilities and liabilities under state and federal laws and regulations pertaining to those discharges.

2. Condition S4. Compliance With Standards. The Utilities submitted comments pertaining to paragraph B of this Condition by letter on April 20. The following comments are supplemental, and in addition to those previously provided.

As discussed above, Ecology is to be commended for including paragraph A under this Condition. However, the language proposed in paragraph A appears to have been taken directly from the statute. As drafted, it is not as clear as it should be, and may be subject to misinterpretation. We recommend that the language be modified as follows to clarify Ecology's intent (new language underlined):

A. In accordance with RCW 90.48.520, the discharge of toxicants or any other material to waters of the state of Washington which would violate or cause a violation of any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited.

Also, as discussed above, the permit draft fails to incorporate explicitly the terms and conditions of the permittee's SMP into the permit. We recommend curing this problem (at least partially) by adopting the following modifications to paragraph E of this Condition (new language underlined):

E. In order to meet the goals of the Clean Water Act, to demonstrate compliance with S4.C and S4.D, and make progress toward compliance with applicable surface water, ground water and sediment management standards, each Permittee shall comply with the requirements of this permit and the Permittee's Stormwater Management Program provided for under Condition S5.

3. Condition S5. Stormwater Management Program. The Utilities submitted comments pertaining to paragraphs B and C of this Condition by letter on April 20. The following comments are supplemental, and in addition to those previously provided.

As discussed above, the permit does not provide for the incorporation of the terms of the SMP into the permit, and fails to provide for Ecology review, approval, and enforcement of the SMP. Subparagraph C4. is the obvious place to fix these shortcomings. Subparagraph C4. should be edited to require Ecology review and approval of the SMP, to incorporate the terms of the SMP into the permit, and thus make them enforceable, and to create an appeals mechanism for the SMP.

Subparagraph C6. provides for the development of structural stormwater controls. Such a program is clearly necessary to ensure the short term and long term achievement of water quality standards.

Adoption of BMPs and public education programs may be sufficient in many instances to protect water quality. However, at this point, both Ecology and the permittees are well aware of many instances where, despite adoption of such measures, there are long term violations of water quality and sediment quality standards. For such circumstances, adoption of structural stormwater controls is the only reliable means of attaining water quality and sediment quality standards.

We recommend that Ecology significantly revise subparagraph C6. The revisions to C6. should make it clear that the adoption and implementation of a program of structural stormwater controls is mandatory, and must be focused on curing ongoing exceedances of water quality and sediment quality standards. The revisions should also make it clear that implementation of

structural controls for areas which have persistent exceedances of standards are the highest priority projects under the SMP.

4. Condition S8. Monitoring. This condition does not focus adequately on monitoring for the effectiveness of the SMP in preventing exceedances of applicable sediment standards. Sediment quality impacts are widely recognized as the most serious and long lasting environmental quality problem resulting from municipal storm drain discharges.

Paragraph B. of this condition provides for development of a monitoring program to address "a stormwater related problem". This provision is too vague. And, it fails to address directly the most significant, recognized problem affecting stormwater systems.

We recommend that paragraph B be reconfigured to focus on monitoring sediment quality as a central feature of the Stormwater Management Program Effectiveness Monitoring.

5. Condition S9. Reporting Requirements. This condition contains no provision for the reporting of permit violations. Such a requirement should be created. Citizens should have access to an annual compilation of such violations, and Ecology should have an easy source for reference. We recommend adding the following language:

B.6. A complete listing of all permit violations during the reporting period, and measures taken to remedy or prevent future such violations, including illicit discharges, spills and the dumping or disposal of materials other than stormwater, exceedances of water quality and sediment standards, noncompliance with any provisions of the Stormwater Management Program, and monitoring, reporting, and recordkeeping violations.

Thank you for the opportunity to submit these comments. We would be happy to work with Ecology to address these issues, and to assist in the revision of the draft permit, in any way we can.

May 19, 2006
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Very truly yours,

A handwritten signature in black ink, appearing to read "Loren R. Dunn". The signature is fluid and cursive, with the first name "Loren" and last name "Dunn" clearly distinguishable.

Loren R. Dunn
of
RIDDELL WILLIAMS P.S.

COUNSEL FOR
PUGET SOUND ENERGY

LRD/wp